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In the Matter of the ORS 656.340 Vocational Services Dispute of

**Ott, Calvin , Claimant**

Contested Case No: HH01-131

**PROPOSED & FINAL ORDER**

April 17, 2002

FREIGHTLINER INC. , Petitioner

CALVIN OTT, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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Employer appeals the administrative order issued on September 28, 2001 by the Rehabilitation Review Unit (RRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On February 6, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioning self-insured employer, Freightliner Inc. and its claims administrator Cambridge Integrated Services were represented by attorney Bruce L. Byerly. Respondent Calvin Ott (claimant) was represented by attorney Edward J. Hill. Insurer called Rosemary Rasmussen, claimant, Don Collins, Dan Chiaratti and Jennifer Frank as witnesses. Claimant testified on his own behalf.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

**ISSUE**

The issue is whether MRU correctly found that claimant is not capable of returning to his job at injury and that suitable work is unavailable.

**EVIDENTIARY RULINGS**

Workers' Compensation Division (WCD) Exhibits 1 through 27 and claimant's Supplementary Exhibits 10A, 11A and 19A were received into the record without objection. Insurer's Supplementary Exhibit 24A was received over claimant's relevance objection. At hearing, claimant objected to Insurer's Supplementary Exhibits 6A, 28, 29 and the testimony of all witnesses concerning claimant's job at injury and the question whether claimant's attending physician released him to regular work. Inasmuch as I find claimant's *res judicata* argument unpersuasive as explained below, I overrule his relevance objections and receive insurer's Supplementary Exhibits 28 and 29 and the witnesses' testimony into the record. Claimant also argues that Insurer's Supplementary Exhibit 6A is cumulative; I overrule this objection and receive Exhibit 6A into the record.

**MOTION TO DISMISS**

Claimant asserts a Motion to Dismiss arguing that the Order on Reconsideration dated February 20, 2001 is final and therefore, the identity of claimant's job at injury and the question

whether claimant's attending physician released him to regular work are moot. Claimant cites *Kurt E. Vandervort*, 5 WCSR 115 (2000), an Interim Order Remanding which discusses the "law of the case" doctrine in an administrative law context. However, following remand, a Proposed and Final Order was published in *Vandervort*. In *Kurt E. Vandervort*, 6 WCSR \_\_\_\_ (2002), the director held that the doctrine of issue preclusion does not apply when the WCD's Appellate Review Unit (ARU) issues an order on reconsideration and WCD's Rehabilitation Review Unit (RRU) subsequently evaluates eligibility for vocational services. The director reasoned that ARU and RRU have separate and distinct functions within WCD. ARU has the authority to issue orders resolving disputes over the extent of permanent disability, while RRU has the authority to issue orders involving disputes over entitlement to vocational services. Neither jurisdiction is superior to or bound by the decisions of the other. Therefore, application of issue preclusion or "law of the case" is not applicable between ARU and RRU in resolving these issues.

### FINDINGS OF FACT

Claimant was hired in April 1994 and last worked for employer in April 2000. (Ex. 1; testimony of Rasmussen). During six years of employment, claimant accrued fifteen accepted workers' compensation claims. (Testimony of Rasmussen). Due to claimant's multiple work injuries and his job preference complaints, his supervisor moved him to various job stations on the truck production line. (Testimony of Rasmussen and Chiaratti).

On November 8, 1999, claimant suffered his fourteenth work-related injury with employer. (Testimony of Rasmussen). Insurer accepted a disabling claim for "cervical and lumbar strains". (Ex. 9-4). On this date of injury, claimant worked as an exhaust bracket installer. (Ex. 1; testimony of Rasmussen, Collins, and Chiaratti). Exhaust bracket installer is categorized as light and medium to heavy work. (Ex. 28).

In January 2000, Rosemary Rasmussen, employer's occupational health nurse, submitted a third man job analysis to attending physician Franklin S. Wong, MD and he approved it as appropriate for claimant. (Exs. 3 and 12-3). The third man position is categorized as light to medium. (Ex. 3). Rasmussen chose the third man position because she thought it might accommodate claimant's physical restrictions, and the job was available to claimant under the union seniority system. (Testimony of Rasmussen).

On March 23, 2000, Legacy Rehabilitation Services conducted a Work Capacity Evaluation and rated claimant's ability to work in the heavy category. (Ex. 5-2). On April 3, 2000, Dr. Wong declared claimant's condition medically stationary and released him to perform heavy work. (Ex. 6).

On April 4, 2000, claimant returned to work as a third man, a light to medium position. (Ex. 3; testimony of Rasmussen). After four hours on the job, claimant suffered another work injury. (Testimony of Rasmussen). Following claimant's fifteenth work injury, Rasmussen wrote to Dr. Wong asking whether claimant posed a hazard to himself or others in the workplace. (Testimony of Rasmussen). Dr. Wong stated that although claimant was released to heavy work, he was at risk of repeated injuries to himself and that he might pose a risk of injuries to others in

the workplace. (Ex. 7). As a result of this letter, employer did not return claimant to work. (Testimony of Rasmussen). On May 30, 2000, Dr. Wong released claimant to regular work. (Ex. 8).

On October 12, 2000, insurer issued a Notice of Closure awarding 11 percent permanent partial disability (PPD). (Ex. 9).

On February 15, 2001, Jennifer O. Frank (Frank), MA, Vocational Consultant, conducted an eligibility evaluation, listing claimant's job at injury as "production worker". (Ex. 12-3). Based on Dr. Wong's approval of the third man job analysis and the release to heavy work, Frank recommended that claimant be considered ineligible for vocational services. (Ex. 12-5). Insurer issued a notice of ineligibility dated February 15, 2001 and claimant appealed. (Exs. 13 and 15).

Daniel Presbylowski, RRU Vocational Consultant, conducted an investigation of the vocational services dispute. In April 2001, he requested and received information from insurer. (Exs. 16 and 17). In July 2001, he requested and received information from insurer's attorney. (Exs. 20 and 21). From May 2001 through September 2001, he made eight telephone calls including one to Frank, employer's vocational consultant and one to Rasmussen, employer's occupational health nurse. (Ex. 18). In Presbylowski's telephone contacts, claimant stated that his job at injury was "floater" while Rasmussen stated that claimant's job at injury was "third man". (*Id.*) Rasmussen mistakenly identified claimant's job at injury because she confused his job duties on the fourteenth and the fifteenth dates of injury. (Testimony of Rasmussen).

On January 8, 2001, the Appellate Review Unit of WCD issued an Order on Reconsideration increasing the PPD award to 14 percent. The Order on Reconsideration listed claimant's job at injury as "Painter, Transportation Equipment" (Dictionary of Occupational Titles 845.381-014), Specific Vocational Preparation (SVP) of 6. (Ex. 14-3).

In March 2001, claimant was laid off in a group of 875 employees. (Ex. 11A; testimony of Rasmussen).

Claimant pled guilty to a criminal charge of First Degree Manslaughter, served nine years in prison and was released in 1989. (Testimony of claimant).

### CONCLUSIONS OF LAW

1. Claimant's regular job on the November 8, 1999 date of injury was exhaust bracket installer.
2. The attending physician released claimant to heavy work and to regular work.

## OPINION

Jurisdiction over this vocational services case lies with the director. ORS 656.340(4); ORS 656.704(3)(a). Vocational assistance disputes arising under ORS 656.340 are reviewed pursuant to the limited scope of review specified by ORS 656.283. OAR 436-001-0225(5).

ORS 656.340(4) provides in part:

“\*\*\*If the insured or self-insured employer decides that the worker is not eligible, the worker may apply to the director for review of the decision as provided in ORS 656.283.\*\*\*”

ORS 656.283(2)(c) provides in part:

“\*\*\*At the contested case hearing, the decision of the director’s administrative review shall be modified only if it:

“(A) Violates a statute or rule;

(B) Exceeds the statutory authority of the agency;

(C) Was made upon unlawful procedure;

(D) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

In determining whether one of those criteria exist, I may admit evidence which was not before RRU and make independent findings of fact. *Colclasure v. Washington County School District No. 48-J*, 317 Or 526, 537 (1993); *Joseph A. Richard*, 1 WCSR 3 (1996). The burden of proof rests upon the proponent of that fact or position. ORS 183.450(2).

Under ORS 656.340(1)(a), the insurer is obligated to provide vocational assistance to injured workers who are eligible. OAR 436-120-0320(8)(c) (eff. 6-1-00) provides:

“(8) A worker entitled to a vocational eligibility evaluation is eligible for vocational services if all the following additional conditions are met:

(c) As a result of the limitations caused by the injury or aggravation, the worker:

(A) Is not able to return to regular employment;

(B) Is not able to return to any suitable and available work with the employer at injury or aggravation; and

(C) Has a substantial handicap to employment and requires

assistance to overcome that handicap.”

In the administrative order, RRU determined that claimant was unable to return to his regular work as a “production worker”, that he was unable to return to any other suitable and available work, and therefore, he was eligible for vocational services. RRU based in its decision on information it ascertained in its investigation.

#### Abuse of Discretion

Insurer contends that RRU abused its discretion because its decision was based on incorrect and incomplete information. For example, claimant’s regular work on the November 8, 1999 date of injury was that of “exhaust installer” rather than “production worker” as RRU found. In support of its position, insurer cites the court’s decision in *Liberty Northwest Insurance Corp. v. Jacobson*, 164 Or App 37 (1999). In *Jacobson*, claimant requested additional training, contending that the vocational provider made misrepresentations concerning the nature of the training he received. RRU denied claimant’s request without investigating claimant’s contention. The court held that RRU’s failure to adequately investigate was an abuse of discretion within the meaning of ORS 656.283(2)(c)(D).

Here, in contrast, RRU contacted the employer or employers’ representatives four times requesting information concerning claimant’s job duties and work release. The employer incorrectly identified claimant’s job at injury and failed to provide RRU with a copy of the attending physician release to heavy work without restrictions. Under these circumstances, I cannot find that RRU abused its discretion.

#### Error of Law

The facts presented at hearing are different from the record that RRU considered. For example, the attending physician released claimant to heavy work without restrictions on April 3, 2000, within six months of the date of injury. When RRU contacted the employer to investigate claimant’s eligibility, the employer failed to provide a copy of the release to heavy work. However, this work status report was received into evidence at hearing.

Also, during its investigation, RRU contacted the employer and it misidentified claimant’s job at injury. However, at hearing, the credible testimony established that claimant’s job on the date of injury was “exhaust bracket installer” which is categorized as light and medium to heavy work. Moreover, the attending physician approved the job analysis for this position as appropriate for claimant.

Under *Colclasure*, I may receive new evidence to determine whether modification of the administrative order is warranted pursuant to ORS 656.283. The facts presented at hearing establish that claimant was released to heavy work without restrictions and was able to return to regular work. Therefore, the administrative order finding claimant eligible for vocational services violates OAR 436-120-0320(8)(c)(A). Accordingly, I modify the administrative order. ORS 656.283(2)(c)(A). 1

I In order to establish eligibility, claimant must meet all conditions listed in OAR 436-120-0320(8). Because the evidence shows that claimant was able to return to regular work, I do not address the question whether suitable work was available.

### **ATTORNEY FEES**

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

### **ORDER**

IT IS HEREBY ORDERED that:

The Directors Review and Order dated September 28, 2001 is reversed.  
DATED this \_\_\_\_\_ day of April 2002.

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Catherine P. Coburn,  
Administrative Law Judge  
Hearing Officer Panel